In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-682

LOCAL UNION NO. 749, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. The Board held that petitioner Union violated Section 8(b)(2) and (1)(A) of the National Labor Relations Act (Pet. App. 43) by causing an employer, with whom it had a union security agreement, to discharge three employees who, although willing to pay the requisite union dues and fees, refused to assume formal union membership (Pet. App. 6-41). The Board applied its earlier decision in *Union Starch and Refining Co.*, 87 NLRB 779, enforced, 186 F. 2d 1008 (C.A. 7), certiorari denied, 342 U.S. 815, where it

had concluded that the provisos to Section 8(a)(3) of the Act (n. 1, *infra*) permit an employee to be discharged pursuant to a union agreement only for failure to tender periodic dues and initiation fees.[1] The court below sustained the Board's holding in this case and enforced its remedial order (Pet. App. 1-5).

2. Petitioner challenges the Board's *Union Starch* interpretation, contending that the Act permits an employee to be discharged under a union security agreement not only for failing to pay periodic dues and initiation fees, but also for failing to join the union. As the court below noted, however, the *Union Starch* interpretation "has been sanctioned by virtually every other circuit court of appeals * * * and referred to approvingly by the Supreme Court" (Pet. App. 4). See *National Labor Relations Board* v. *General Motors Corp.*, 373 U.S. 734, 743; *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 197,

[1] The first proviso exempts from the ban on employer discrimination to encourage union membership in Section 8(a)(3), an agreement requiring "as a condition of employment membership [in a labor organization] on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later." The second proviso adds that "no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." Section 8(b)(2), in turn, makes it unlawful for a labor organization "to cause or attempt to cause an employer * * * to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." (Pet. App. 42-43.)

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n. 37; *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 284. In these circumstances, no issue warranting review is presented.[2]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

DECEMBER 1972.

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[2] Petitioner contends (Pet. 9) that the Board's interpretation of the provisos to Section 8(a)(3) renders superfluous proviso (A) (n. 1, *supra*), which permits an employer to reject a union demand for discharge under a union security agreement "if he has reasonable grounds for believing that [union] membership was not available to the employee on the same terms and conditions generally applicable to other members." But as the Board explained in *Union Starch*, 87 NLRB at 784: "proviso (B) requires a tender of dues and fees, whereas proviso (A) protects any employee discriminatorily excluded from membership whether or not such tender is made."

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